

REMARKS

Withdrawn Claims

Claim 39 has been withdrawn because it depends from cancelled independent claim 44. The Applicant has amended withdrawn claim 39 to depend from pending independent claim 55. Accordingly, the Applicant respectfully requests reinstatement of withdrawn claim 39.

Allowed Claims

The Applicant thanks the Examiner for the indication that claims 15-23, 41-43, 51, 52, 65 and 67 have been allowed.

Allowable Claims

As set forth on page 4 of the non-final Office Action under the heading Allowable Subject Matter, “[c]laims 54 and 55 are objected to as being dependent upon a rejected based claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.” The Applicant notes that claims 54 and 55 have already been rewritten in independent form. In view of the indication of allowability set forth on page 4 of the non-final Office Action, allowance of rewritten independent claim 54 and 55 is respectfully requested.

Dependent claims 39, 40, 45-47, 49 and 50 depend from independent claim 55 and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 55. Furthermore, additional reasons support the patentability of dependent claims 39, 40, 45-47, 49 and 50. For example, claim 45 recites that “said transverse stop element is formed integral with said stem portion and together define a single-piece, monolithic structure”, and claim 46 recites that “said flange portion is formed integral with said stem portion and together define a single-piece, monolithic structure”.

The Office Action asserts that the prosthesis 12 comprises an elongated stem 12, and further asserts that the retaining plate 66 has upper and lower sections which respectively define a transverse flange portion and a transverse stop element. Even assuming arguendo that the proffered characterization of the prosthesis 12 and the retaining plate 66 is accepted, the Applicant submits that Doty fails to disclose the features recited in dependent claims 45 and 46.

As shown in Figure 7 and as described in the specification, the retaining plate 66 and the prosthesis 12 are clearly not integral with one another such that these elements “together define a single-piece, monolithic structure”, as recited in dependent claims 45 and 46. Instead, the retaining plate 66 and the prosthesis 12 comprise individual components that are separate from one another, and clearly do not together define a single-piece, monolithic structure. Specifically, as illustrated in Figure 7 and as specifically described in the specification, the retaining plate 66 is attached to the prosthesis 12 via machine screws 68. (See column 4, lines 53-55). Moreover, Doty teaches that the retaining plate 66 is attached to the prosthesis 12 after the prosthesis 12 is positioned between the upper and lower vertebral bodies. (See column 4, lines 47-52). Accordingly, Doty fails to disclose, and in fact teaches away from, providing the retaining plate 66 and the prosthesis 12 as “a single-piece, monolithic structure”, as recited in dependent claims 45 and 46.

Moreover, claim 50 recites that “said elongated driver shaft is threadedly engaged with said stem portion”. The Office Action asserts that the wrench 32 comprises an elongated driver shaft. Even assuming arguendo that the wrench 32 could be construed as an elongated driver shaft and that the prosthesis 12 could be construed as a stem portion, the wrench 32 is clearly not in any way “threadedly engaged” with the prosthesis 12, as recited in claim 50. Indeed, the only contact between the wrench 32 and the prosthesis 12 is the engagement of the gear head 34 with the gear teeth 26 on the pins 20. However, the intermeshing engagement between the gear head 34 and the gear teeth 26 clearly does not constitute threading engagement, and Doty fails to even suggest threading engagement between any portion of the wrench 32 and the prosthesis 12.

Additionally, new dependent claim 73 has been added which depends from independent claim 54, and which recites that “said stem portion has opposite top and bottom bone engaging surfaces with said height of said stem portion defined between said opposite top and bottom bone engaging surfaces”, and “wherein said rounded leading end portion of said stem portion defines a curvature extending along said height between said opposite top and bottom bone engaging surfaces to facilitate insertion of said stem portion into the intervertebral space and distraction of the adjacent vertebrae”. The Applicant submits that the features recited in dependent claim 73 are not in any way disclosed or suggested by Doty or any of the other references of record, whether considered alone or in combination with one another.

Independent Claim 71

Independent claim 71 has been rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,599,086 to Doty.

The Applicant submits that the grounds for rejection set forth in the non-final Office Action do not address each of the features and steps recited in independent method claim 71. Specifically, there is no indication in the Office Action regarding any disclosure Doty that teaches the use of “a tubular sleeve”, or that teaches the steps of “advancing a surgical device through the tubular sleeve toward the intervertebral space” and “transmitting an axial reduction force to the anteriorly offset vertebra to reduce the spondylolisthesis condition”. The Applicant has thoroughly reviewed Doty and can find no reference whatsoever regarding these recited features and steps. In particular, Doty fails to disclose any element or structure that corresponds to “a tubular sleeve”, much less the recited step of “advancing a surgical device through the tubular sleeve toward the intervertebral space”. Furthermore, the Office Action does not set forth any grounds or assertions whatsoever regarding the “tubular sleeve” or the step of “advancing a surgical device through the tubular sleeve toward the intervertebral space”. Additionally, the Office Action fails to set forth any grounds indicating how the Doty device is used in “transmitting an axial reduction force to the anteriorly offset vertebra to reduce the spondylolisthesis condition”.

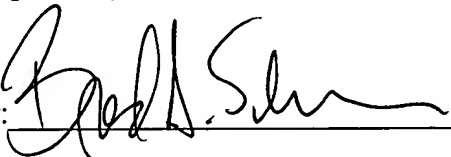
The Applicant also notes that independent claim 71 is a method claim, and that in order for a reference to anticipate a method claim, the reference must disclose the recited steps or acts, and not merely a structure that is capable of performing the steps or act. The Applicant further notes that “[i]t is well established that “an invention is anticipated if the same device, including all the claim limitations, is shown in a single prior art reference. Every element of the claimed invention must be literally present, arranged as in the claim.” Richardson v. Suzuki Motor Co. Ltd., 9 USPQ.2d 1913, 1920 (Fed. Cir. 1989). Since the Office Action fails to set forth sufficient grounds as to how each and every element and step recited in independent claim 71 is disclosed in the Doty reference, a *prima facie* case of anticipation has clearly not been established with regard to independent claim 71. For the reasons set forth above, the Applicant submits that independent claim 71 is not anticipated by the ‘086 patent, and respectfully requests withdrawal of the rejection of independent claim 71 and allowance of the same.

CONCLUSION

In view of the foregoing remarks, it is respectfully submitted that Applicant's application is in condition for allowance with pending claims 15-23, 39-43, 45-47, 49-52, 54, 55, 65, 67, 71 and 73.

Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

Respectfully submitted,

By: 

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